

Respondent contends claimant has failed to prove she sustained a compensable injury to her right upper extremity and that compensation for the left upper extremity should be limited to Dr. Chris D. Fevurly's 3 percent rating. Respondent also contends claimant failed to provide timely notice to her employer as required by K.S.A. 44-520. Respondent

requests that the Board overturn the Judge's determination that claimant provided timely and proper notice of her alleged accidental injury and, therefore, claimant is not entitled to receive benefits.

Claimant requests the Board to affirm the Award.

The issues before the Board on this appeal are:

1. Did claimant sustain personal injury by accident to her right upper extremity arising out of and in the course of her employment with respondent?
2. Did claimant provide notice of accidental injury for both her alleged left and right upper extremity injuries as required by statute?
3. What is the nature and extent of claimant's disability?

**FINDINGS OF FACT**

After reviewing the entire record and considering the parties' arguments, the Board finds and concludes:

On November 18, 2005, claimant was employed by respondent as a case manager, assisting clients with serious, persistent mental illness. On that date, claimant was escorting a client to where he was going to be living. The client lost his balance and fell backwards. Claimant caught him and put him back on his feet. Claimant caught most of the client's weight with her left arm. Claimant did not think her injury was serious at the time.

Pam Brandenburg, claimant's supervisor, recalls claimant telling her that she hurt her shoulder but she does not know when this occurred. Claimant's best recollection is that she informed her supervisor of the November 18, 2005, incident within two weeks of its occurrence. There is no documentation of this conversation. There is also no evidence to contradict claimant's testimony.

Claimant completed an incident report on January 27, 2006. The report was completed after claimant informed respondent's operations manager that she had an accident and hurt her shoulder. Pursuant to respondent's policy, claimant received medical treatment from Dr. Mead at St. Francis Hospital in February or March 2006.

Claimant was eventually diagnosed with a rotator cuff tear in her left shoulder and left elbow entrapment of the ulnar nerve. Claimant's shoulder and elbow were surgically repaired by a Dr. Knappenberger in June 2006 and August 2006, respectively.

At the request of her attorney, claimant was examined by Dr. Lynn A. Curtis on May 1, 2008. The doctor found claimant had left shoulder and left elbow injuries. He also opined that claimant has lateral epicondylitis in her right elbow. Dr. Curtis opined that the right lateral epicondylitis is traceable to the original injury because in order to do office work claimant would have to use both upper extremities and she had to use her right upper extremity more frequently than her left as compensation for her left upper extremity injury.

Dr. Curtis rated claimant's permanent functional impairment using the *AMA Guides*.<sup>1</sup> He found a 33 percent impairment to the left upper extremity and a 10 percent impairment to the right upper extremity for the right lateral epicondylitis.

Dr. Chris D. Fevurly examined the claimant on November 24, 2008, at respondent's request. He found the claimant had full active range of motion in both shoulders, no weakness, no excessive crepitation and well-healed surgical scars on the left shoulder. Dr. Fevurly found tennis elbow in both elbows. He also did not feel that the right arm complaints were due to overuse. Dr. Fevurly found claimant had a 3 percent permanent impairment to the left upper extremity and no ratable impairment to the right upper extremity.

At the request of the Court, Dr. Peter V. Bieri examined the claimant on April 20, 2009. Dr. Bieri concluded that claimant had incurred injuries to the left shoulder and left elbow on or about November 18, 2005. He also found that claimant had developed compensatory right lateral epicondylitis. Using the *Guides*, Dr. Bieri rated claimant's permanent functional impairment as 29 percent to the left upper extremity and 3 percent to the right upper extremity.

### **PRINCIPLES OF LAW AND ANALYSIS**

### **CONCLUSIONS OF LAW**

A claimant in a workers compensation proceeding has the burden of proof to establish by a preponderance of the credible evidence the right to an award of compensation and to prove the various conditions on which his or her right depends.<sup>2</sup>

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<sup>1</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

<sup>2</sup> K.S.A. 2005 Supp. 44-501(a); *Perez v. IBP, Inc.*, 16 Kan. App. 2d 277, 826 P.2d 520 (1991).

The two phrases arising “out of” and “in the course of” employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

The phrase “out of” employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises “out of” employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises “out of” employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase “in the course of” employment relates to the time, place, and circumstances under which the accident occurred and means the injury happened while the worker was at work in the employer’s service.<sup>3</sup>

Respondent contends the claimant did not meet her burden of proof that she suffered personal injury by accident arising out of and in the course of her employment with respondent to her right upper extremity. The greater weight of the evidence does not support respondent’s argument. Of the three medical doctors rating the impairment of the claimant, two found the claimant had a ratable impairment to her right upper extremity due to overcompensation for her left upper extremity while she continued to perform her job duties.

The claimant has shown by the preponderance of the credible evidence that the right upper extremity injury arose out of and in the course of her employment with respondent.

Respondent contends claimant failed to provide timely notice of her accident to respondent. K.S.A. 44-520 states:

Except as otherwise provided in this section, proceedings for compensation under the workers compensation act shall not be maintainable unless notice of the accident, stating the time and place and particulars thereof, and the name and address of the person injured, is given to the employer within 10 days after the date of the accident, except that actual knowledge of the accident by the employer or the employer’s duly authorized agent shall render the giving of such notice unnecessary. The ten-day notice provided in this section shall not bar any proceeding for compensation under the workers compensation act if the claimant shows that a failure to notify under this section was due to just cause, except that in no event shall such a proceeding for compensation be maintained unless the notice required by this section is given to the employer within 75 days after the date

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<sup>3</sup> *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 278, 899 P.2d 1058 (1995).

of the accident unless (a) actual knowledge of the accident by the employer or the employer's duly authorized agent renders the giving of such notice unnecessary as provided in this section, (b) the employer was unavailable to receive such notice as provided in this section, or (c) the employee was physically unable to give such notice.

The Kansas Supreme Court in *Bain*<sup>4</sup> held that the ten-day statutory notice does not include weekends and legal holidays. Per *Bain*, Monday, December 5, 2005, would be the ten-day limit for claimant to give notice.

Claimant's best recollection of when she informed her supervisor of the November 18, 2005, accident is within two weeks of the accident; that would be sometime by or before December 2, 2005. There is no evidence that contradicts the claimant's recollection. The Board finds the notice was timely.

The nature and extent of the claimant's permanent impairment to the right upper extremity is 3 percent and to the left upper extremity is 29 percent. Of the three medical opinions rendered as to claimant's impairment, Dr. Bieri's is found to be the most reliable and persuasive opinion rendered. The Judge was persuaded by the opinions of Dr. Bieri, who examined the claimant at the request of the Court. The Board sees no reason to disturb the Judge's finding.

As required by the Workers Compensation Act, all five members of the Board have considered the evidence and issues presented in this appeal.<sup>5</sup> Accordingly, the findings and conclusions set forth above reflect the majority's decision and the signatures below attest that this decision is that of the majority.

### **AWARD**

**WHEREFORE**, the Board affirms the award of permanent disability benefits for a 29 percent impairment to the left upper extremity and a 3 percent impairment to the right upper extremity but modifies the August 4, 2009, Award entered by Judge Sanders as set forth below regarding the order approving claimant's contract of employment with counsel.

The ALJ approved claimant's contract of employment with counsel. The record, however, does not contain a written contract of employment between the claimant and her attorney. A reasonable claimant attorney fee shall be awarded in accordance with K.S.A. 44-536 upon presentation of the claimant's attorney's written contract of employment and

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<sup>4</sup> *Bain v. Cormack Enterprises, Inc.*, 267 Kan. 754, 986 P.2d 373 (1999).

<sup>5</sup> K.S.A. 2008 Supp. 44-555c(k).

subject to approval of such contract by the Director. The provision in the Award approving claimant's contract of employment with counsel is set aside.

The Board adopts the remaining orders set forth in the Award to the extent they are not inconsistent with the above.

**IT IS SO ORDERED.**

Dated this \_\_\_\_ day of January, 2010.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: George H. Pearson, Attorney for Claimant  
Ryan D. Weltz, Attorney for Respondent and its Insurance Carrier  
Rebecca A. Sanders, Administrative Law Judge